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IN THE

Supreme Court of the United States

ERIC I. EISEN,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this matter, the Pennsylvania Superior Court dismissed Petitioner's post-conviction relief petition asserting after-discovered evidence on timeliness grounds, even though Petitioner could not have filed that petition until the conclusion of his then-existing federal habeas corpus proceedings without forfeiting federal review of his habeas corpus claims and the after-discovered evidence.

This case presents the following questions:

1. Whether a state court violates the Fourteenth Amendment's guarantee of due process when it dismisses on timeliness grounds a petition for post-conviction relief asserting after-discovered evidence where the petitioner could not have filed the petition until the conclusion of his then-existing federal habeas corpus proceedings without forfeiting federal review of his habeas corpus claims and the after-discovered evidence?

2. Whether a Pennsylvania court violates the Fourteenth Amendment's guarantee of equal protection when it applies a time bar to dismiss a second post-conviction petition based on after-discovered evidence where the petitioner could not have filed the petition any sooner without forfeiting federal review of his then-existing habeas corpus claims and the after-discovered evidence, and where the

Pennsylvania Supreme Court has allowed extensions to the time bar both for constitutionally protected and unprotected reasons?

3. Whether a state court violates the Supremacy Clause when it refuses to review a post-conviction petition because the petitioner had pursued review under the federal habeas corpus statute?

4. Whether a federal district court may stay and abey an unmixed habeas corpus petition under *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), in order to return the matter to state court?

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CITATIONS TO OPINIONS

The March 24, 2008 Order of the Pennsylvania Supreme Court dismissing the appeal as improvidently granted in Nos. 28-29 WAP 2007 is officially reported at *Commonwealth v. Eisen*, 943 A.2d. 261 (Pa. 2008). *See* Appendix ("App.") A. The Superior Court's en banc decision of October 23, 2006 in Nos. 679 and 885 WDA 2004 is officially reported without opinion at *Commonwealth v. Eisen*, 913 A.2d 940 (Pa. Super. Ct. 2006). A copy of the Superior Court's opinion is set forth in App. C. The Superior Court reversed the decision of the Court of Common Pleas of Allegheny County of April 22, 2004 in Nos. CC 199302685 and 199304232, unofficially reported at *Commonwealth v. Eisen*, 2004 WL 5393561 (Allegheny Ct. Com. Pleas, Apr. 22, 2004), that vacated the guilty plea entered by Petitioner Eric I. Eisen on May 23, 1994 and granted him a new trial. A copy of the Court of Common Pleas' opinion is set forth in App. D.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). As a result of the Pennsylvania Supreme Court's March 24, 2008 Order dismissing Petitioner's appeal, the Pennsylvania Superior Court's en banc decision of October 23, 2006 became a final judgment by the highest court in Pennsylvania in which a decision could be rendered. Petitioner requests this Court to grant a writ of certiorari to address whether the Superior Court's decision that his second state post-conviction relief petition was time-barred violates the Fourteenth Amendment's guarantees of due process and

equal protection, and/or the Supremacy Clause, and whether a federal court can "stay and abey" an "unmixed" petition in order to return a case to state court.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

- The Due Process Clause of the Fourteenth Amendment provides that a State cannot deny a person of his or her liberty "without due process of law." U.S. CONST. amend. XIV, § 1.

- The Fourteenth Amendment provides that a State shall not deny any person "the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

- The Supremacy Clause states: "This Constitution and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl.2.

- 42 Pa. C. S. § 9545. Jurisdiction and proceedings

  (a) . . . .

  (b) Time for filing petition.—

> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) . . . .
>
> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; . . .
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

STATEMENT OF THE CASE

The principal facts in this case are not in dispute. Petitioner Eric I. Eisen ("Eisen" or "Petitioner") filed a federal habeas corpus petition under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") in October 1999 in the United States District Court for the Western District of Pennsylvania raising ineffective assistance of counsel and prosecutorial misconduct. In February 2000, additional evidence of prosecutorial misconduct emerged during televised broadcasts that supported Eisen's petition, and he moved to place it

before the federal court. Since the petition remained unmixed,[1] Eisen was not eligible for "stay and abeyance."

Once the federal petition and its appeal were dismissed, Eisen filed a second petition under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa. C. S. §§ 9541-46, and the state's habeas corpus statute raising the additional evidence of prosecutorial misconduct. The Trial Court denied relief under the PCRA as untimely considering the PCRA's sixty-day period for raising new evidence, but awarded a new trial under the state habeas statute because the new evidence showed that the guilty plea had been induced by prosecutorial misconduct. The Pennsylvania Superior Court en banc reversed, holding that state habeas corpus was subsumed by the PCRA, and that the second PCRA petition was untimely. At the Trial Court, Superior Court, and the Pennsylvania Supreme Court (which initially granted a petition for review but subsequently revoked it), Petitioner raised that he faced a constitutional dilemma when the additional evidence arose in February 2000 during the pendency of his AEDPA petition.[2] As the Commonwealth conceded, if Eisen then had filed his petition in state court, he would

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1. Eisen and the Commonwealth agreed that the petition remained unmixed.

2. *See* App. D, Court of Common Pleas Op. & Order of 4/22/04, at 4-5 (addressing Eisen's argument that filing PCRA petition during pendency of federal habeas jeopardized federal review); App. C, Pa. Superior Court en banc Op. of 10/23/06, at 11-18 (same); App. B, Pa. Supreme Court Order of 10/18/07 (granting allocatur on issue whether filing PCRA petition during pendency of federal habeas jeopardized federal review).

have forfeited the right to review under AEDPA of matters before the federal court. Yet, when he filed subsequently in state court, his PCRA petition was deemed to be time-barred. In essence, this meant that Eisen was placed in the position of having to decide between federal and state review.

This case arose on February 8, 1993. Petitioner and James C. Smith ("Smith") were charged with criminal homicide, robbery, and criminal conspiracy in connection with the death of Daniel Bostedo ("Bostedo"). During an encounter near Pittsburgh, Smith stumbled, his gun discharged accidentally, and Bostedo was fatally shot.

In May 1994, Eisen's counsel and Allegheny County Deputy District Attorney W. Christopher Conrad ("Conrad" or "Prosecutor") negotiated a guilty plea. The heart of the deal was a "Sentencing Exhibit," a written document not previously used in state court. Conrad, who wrote the initial draft, represented that the Sentencing Exhibit would be a meaningful tool for release in an eventual commutation proceeding. Eisen and his counsel believed him. In final form, the Sentencing Exhibit, which related the accidental nature of the killing and remorse of the Petitioner (a first offender), was the sole consideration for a guilty plea to second degree murder and a life sentence without parole that the Trial Court implemented on May 23, 1994.

Through new counsel, Eisen filed a PCRA petition asserting that his plea had been unlawfully induced and that the Sentencing Exhibit was meaningless since commutation of a life sentence without parole was historically and statistically unavailable in Pennsylvania.

On December 31, 1995, Allegheny County Court of Common Pleas Judge Lawrence J. O'Toole ("Judge O'Toole") vacated Eisen's guilty plea and granted a new trial finding that the court had failed to obtain Eisen's specific understanding of the Sentencing Exhibit:

> It should be noted that the Commonwealth was not seeking the death penalty in this case and that therefore for [the Petitioner] to go to trial he would be in no worse shape being convicted by jury of either first or second degree murder than he was pursuant to the plea agreement. Obviously the sentencing exhibit had to have had some value in the mind of [the Petitioner] for him to engage in this understanding. Given the subsequent record it is obvious that [the Petitioner] would not have entered a plea under these circumstances pursuant to a sentencing exhibit unless he felt there was some distinct value to be obtained.

Trial Ct. Op. of 2/13/96, at 6.

On May 19, 1998, the Pennsylvania Superior Court vacated Judge O'Toole's Order and reinstated the guilty plea. The Superior Court rejected Eisen's argument that "he was deceived, mislead or misinformed with respect to the Sentencing Exhibit." Superior Ct. Op. of 5/19/98, at 9. Subsequently the Pennsylvania Supreme Court denied Eisen's petition for allowance of review.

On October 1, 1999, Eisen filed a Petition for a Writ of Habeas Corpus in the District Court for the Western

District of Pennsylvania raising ineffectiveness of counsel and prosecutorial misconduct. In February 2000, two televised news reports dealt with Bostedo's death and Eisen's sentence. In the first, a reporter interviewed the victim's mother who stated that Conrad had promised her "that there would be no way that those two would get out of jail." In the second, the reporter asked the Prosecutor, "if you were so intent on keeping them [Eisen and Smith] in prison, why would you sign the sentencing exhibit for their future clemency?" Conrad replied: "You want to know something, I didn't think it would ever mean anything in the world." The broadcasts offered a small amount of additional evidence – actually just two sentences – that the Prosecutor knowingly had tricked Eisen into relinquishing his right to a trial in exchange for a worthless document.

On June 26, 2000, Eisen petitioned Magistrate Judge Kenneth J. Benson to allow discovery for the purpose of authenticating videotapes of the February 2000 broadcasts. Eisen acted under mandatory Rule 2(c) of the Federal Rules Governing 28 U.S.C. § 2254 cases requiring state prisoners to provide "all grounds for relief which are available to the petitioner and of which he has or by the exercise of reasonable diligence should have knowledge." The Commonwealth opposed the petition based on non-exhaustion and procedural default.

On July 5, 2000, the Magistrate issued a preliminary Memorandum and Order indicating that the matter would be taken under advisement:

> If the respondent is right and these issues have been defaulted or are not exhausted, then we do not get to the merits of the case. If we do not get to the merits of the case, then evidence of what the prosecutor said to others about the sentencing exhibit, or what he thought of it himself, may not be relevant.
>
> Until it is determined this evidence is relevant it certainly cannot be said to be crucial. Therefore, [. . .] I will defer ruling on this motion until such time as I conclude we must get beyond exhaustion and default.

Mem. & Order of 7/5/00, at 2 (App. F).

On July 12, 2000, the Magistrate granted Petitioner's motion to take discovery for the purpose of authenticating the videotape evidence and specifically rejected the Commonwealth's assertions of non-exhaustion and procedural default. Order of 7/12/00, at 1 (App. E). The Magistrate "determined that the *ratio decidendi* of this case will NOT be non-exhaustion or procedural default, and hence that the merits will be reached." *Id.* On July 30, 2000, the parties notified the Magistrate that they had agreed to authenticity which eliminated the need for discovery.

On August 18, 2000, Eisen moved for the introduction into evidence of portions of the videotapes.

He acted in compliance with Rule 7 of the Federal Rules Governing 28 U.S.C. §2254 cases by seeking to expand the record with additional evidentiary materials. The motion never was opposed by the Commonwealth.

On January 2, 2002, the Magistrate issued a Report and Recommendation that dismissed the habeas petition and denied a certificate of appealability. The Magistrate did not address the broadcast evidence. The District Court adopted the Report and Recommendation on April 5, 2002. On February 24, 2003, the Third Circuit affirmed the denial of the certificate of appealability. On June 26, 2003, the Circuit denied Eisen's petition for rehearing. A petition for writ of certiorari was denied on January 10, 2004.

On August 25, 2003, less than sixty days after the Circuit Court's denial of rehearing, Eisen filed a new PCRA petition and/or petition for relief under the state habeas corpus statute. Judge O'Toole held an evidentiary hearing on January 16, 2004. Eisen and his former counsel testified, and the broadcasts were played and entered into evidence.

On April 22, 2004, Judge O'Toole granted a new trial under the state habeas corpus statute finding that Eisen's guilty plea had been unlawfully induced by prosecutorial misconduct. Court of Common Pleas Op. & Order of 4/22/04, at 3-4 (App. D). According to the Court:

> [I]n deciding whether to plead guilty in this case, the Defendant, and defense counsel, considered the effect that the "Sentencing

> Exhibit" would have on a later request for commutation. Based on representations from the prosecutor, both of them believed that it would be beneficial and helpful in such a request. The subsequent statements by the prosecutor in the 2000 investigation indicated definitively that he did not believe that the document had any worth whatsoever, even though he led the Defendant and his then-counsel to believe otherwise. As the Defendant's guilty plea was based in large part on the plea agreement to plead guilty to Second Degree Murder in exchange for the "Sentencing Exhibit", the Court finds, again, that the Defendant's plea was unlawfully induced.

Id. The Court also ruled that the PCRA could not afford relief to Eisen because the Petition purportedly was time-barred, citing *Commonwealth v. Bennett*, 842 A.2d 953 (Pa. Super. Ct. 2004).[3] *Id.*, at 4-5. Although the Court recognized Eisen's concern "that filing a second PCRA petition in state court would jeopardize his Petition for Writ of Habeas Corpus pending in federal court," the Court nevertheless found that "such does not change the jurisdictional provisions of the PCRA." *Id.* at 4.

On April 23, 2004, the Commonwealth appealed the Court's Order. Petitioner cross-appealed the denial of PCRA review. On October 23, 2006, the Pennsylvania

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3. This decision was reversed by the Pennsylvania Supreme Court in *Commonwealth v. Bennett*, 930 A.2d 1264 (Pa. 2007).

Superior Court en banc vacated the decision of the Trial Court and reinstated Petitioner's sentence. According to the Superior Court, the PCRA Petition was not timely because Eisen did not file his claim of after-discovered evidence within the statutory time limit. The Superior Court held for the first time that within 60 days of the telecasts, the Petitioner could have filed a "'protective' petition" requesting the District Court to "stay and abey" his habeas case and then timely filed his second PCRA Petition in state court. The opinion relied retroactively on *Rhines v. Weber*, 544 U.S. 269 (2005), and *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), decided five (5) years after the Petitioner faced his procedural dilemma, notwithstanding that those cases dealt solely with stays of "mixed" petitions. Both parties informed the Superior Court that Eisen's inclusion of the videotape statements did not create a "mixed" petition, and both represented that putting the new information in state court at that time would have jeopardized federal review under AEDPA.

All pertinent issues, including whether the state court's refusal to entertain Eisen's second PCRA violated due process and/or equal protection, whether the Supremacy Clause was violated, and whether an "unmixed" petition can be stayed were considered by the state courts including the Pennsylvania Supreme Court. On October 18, 2007, that Court granted a petition for allowance of review limited to the following question:

> Whether a second PCRA petition invoking the after-discovered evidence exception to the PCRA's one year filing requirement was filed

> "within 60 days of the date the claim could have been presented" under 42 Pa. C. S. § 9545 where the petition was filed within 60 days of the conclusion of Petitioner's federal *habeas corpus* proceedings and where the filing of the petition prior to the conclusion of the federal proceedings would have jeopardized the Petitioner's federal review of his then-existing *habeas corpus* and/or his after-discovered evidence claim.

Pa. Supreme Ct. Order of 10/18/07 (App. B). On March 24, 2008, the appeal was dismissed without opinion as having been improvidently granted. Pa. Supreme Ct. Order of 3/24/08 (App. A).

REASONS FOR GRANTING THE PETITION

The Trial Court properly found that the Prosecutor unlawfully induced Eisen to plead guilty in exchange for an admittedly worthless document known as the "Sentencing Exhibit," that purportedly would assist Eisen in receiving a later commutation. The finding was based on Conrad's televised statement that the Sentencing Exhibit did not "mean anything in the world," and his promise to the decedent's mother that Eisen never would get out of prison.

As required by the federal rules and *Rose v. Lundy*, Eisen properly brought the revealing television interviews to the federal court's attention. At this stage, Eisen could not have returned to state court to assert an after-discovered evidence claim because he would have forfeited federal review of his existing habeas

corpus claims and/or the after-discovered evidence. Eisen properly waited until the expiration of his federal habeas proceeding before filing the instant PCRA petition and did so "within 60 days of the date the claim could have been presented," as required by 42 Pa. C. S. § 9545(b)(2).

The Superior Court found that Eisen's PCRA petition was time–barred, and that he could have filed a "'protective' petition" requesting the District Court to "stay and abey." The ruling is contrary to the facts in this case because the federal court had held that the introduction of the television interviews did not convert Eisen's habeas petition into a "mixed" petition, and therefore Eisen would not have been entitled to a stay had he requested one. The Superior Court retroactively applied *Rhines v. Weber*, 544 U.S. 269 (2005), and *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), although there was no authority in 2000 that a petitioner like Eisen would have received a stay if he had requested one even with a mixed petition, or if he did receive a stay that it would have been upheld on appeal.

Petitioner urges that review by the Supreme Court is necessary to clarify the friction between AEDPA and a state's post-conviction statute when a small amount of additional, consistent evidence arises while a federal habeas petition is pending. Should the petitioner bring it to the attention of the federal court or place it in state court? If he chooses state court does he lose federal rights under AEDPA? Should the petitioner seek a stay even when the federal court clearly decides there is no exhaustion or procedural default problem, and the petition remains unmixed? Can an unmixed petition be

stayed by a federal court? Under the present circumstances, a petitioner such as Eisen must choose between state and federal review. Whether such a difficult posture is constitutionally valid remains to be determined.

I. Review Is Necessary To Decide Whether A State Court Violates Due Process When It Applies A Time Bar To Dismiss A Second Post Conviction Petition Based On After-Discovered Evidence Where The Petitioner Could Not Have Filed The Petition Any Sooner Without Forfeiting Federal Court Review Of His Then-Existing Habeas Claims And The After-Discovered Evidence.

A State cannot deny a person liberty "without due process of law." U.S. CONST. amend. XIV, § 1. "States have no constitutional obligation to provide a means for collaterally attacking convictions; however, if they do, then such procedures must comport with the fundamental fairness mandated by the Due Process Clause." *Commonwealth v. Haag*, 809 A.2d 271, 283-84 (Pa. 2002) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987)). Because Pennsylvania has implemented a statutory scheme for state prisoners to collaterally attack their convictions – the PCRA – its procedures must comport with the fundamental fairness of the Due Process Clause. *See Commonwealth v. Bennett*, 930 A.2d 1264, 1273 (Pa. 2007) (stating that "due process requires that the post conviction process be fundamentally fair"); *see also Haag*, 809 A.2d at 283-84 (holding "that permitting an incompetent prisoner, who is represented by a next friend and counsel, to pursue PCRA relief comports with the fundamental fairness of the Due

Process Clause"). Due process requires that PCRA petitioners "*must* be given the opportunity for the presentation of claims at a meaningful time and in a meaningful manner." *Bennett*, 930 A.2d at 1273 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982)) (emphasis added).

In assessing whether state action violates due process, a court should apply the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005); *Commonwealth v. Williams*, 733 A.2d 593, 605 (Pa. 1999) (applying *Mathews* factors to state law). Courts consider distinct factors: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-271 (1970)). "By weighing these concerns, courts can determine whether a State has met the 'fundamental requirement of due process' – 'the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *City of Los Angeles v. David*, 538 U.S. 715, 716-17 (2003) (citations omitted). As asserted here, "a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Boddie v. Connecticut*, 401 U.S. 371, 379-380 (1971); *see also*

Commonwealth v. Copenhefer, 941 A.2d 646, 650 n.1 (Pa. 2007) (Saylor J., concurring) (recognizing that "the timing provisions of the PCRA are subject to as-applied constitutional challenges based on claims of unreasonable application").

A. Petitioner Could Not Have Filed His Second PCRA Petition Within 60 Days Of Discovery Of The New Evidence Of Prosecutorial Misconduct Without Forfeiting Federal Court Review Of His Then-Existing Habeas Claims And The After-Discovered Evidence.

Caught in a "procedural trap," Eisen was forced to wait to bring his second PCRA Petition until the conclusion of his federal habeas corpus proceedings lest he forego federal review of his then-pending habeas claims and the after-discovered evidence of prosecutorial misconduct. When the television interviews involving Conrad and the victim's mother aired, Eisen was litigating his petition under AEDPA and obligated to follow federal habeas procedures. In compliance with Rules 2(c)[4] and 7[5] of the Rules Governing § 2254 Cases,

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4. Rule 2(c) requires habeas petitioners to specify all the grounds for relief available to the petitioner. Rule 2(c) of the Rules Governing § 2254 Cases; *see also, McFarland v. Scott*, 512 U.S. 849, 860 (1994) (O'Connor, J., concurring in part) ("our carefully crafted doctrines of waiver and abuse of the writ make it especially important that the first petition adequately set forth all of a state prisoner's colorable grounds for relief"). Presenting all available claims at once guards against piecemeal litigation. *Rose v. Lundy*, 455 U.S. 509, 520 (1982).

5. Rule 7 permits a federal court, either on a party's motion or *sua sponte*, to "direct the parties to expand the record by

(Cont'd)

Eisen sought to amend his petition to include the recently broadcast evidence first by moving to take discovery, then by having the Commonwealth agree to the authenticity of the evidence, and then by moving to introduce the evidence. For reasons that remain unclear, the Magistrate never ruled on Eisen's motion (even though it was unopposed) and never addressed the broadcast evidence in his Report and Recommendation.

On April 5, 2002, the District Court adopted the Report and Recommendation and denied a certificate of appealability. Eisen appealed to the Third Circuit, which on February 24, 2003 affirmed the denial of the certificate of appealability. On June 26, 2003, the Third Circuit denied Eisen's petition for a rehearing. Within 60 days of the conclusion of the federal habeas proceedings, Eisen filed his second PCRA Petition based on the televised material in compliance with the PCRA's 60-day time limit for raising after-discovered evidence. *See* 42 Pa. C. S. § 9545(b) (1)-(2).

(Cont'd)

submitting additional materials relating to the petition." Rule 7(a) of the Rules Governing § 2254 Cases; Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure*, § 19.5, p. 792 (4th Ed. 2001). Rule 7 allows a court to receive all or at least some of the evidence relevant to the disposition of the petition without a formal hearing. *Id.* It also relaxes the rules of evidence by giving the court discretion to admit virtually all evidence that is relevant to the determination of the petition, is tangible or real evidence that was not created in anticipation of litigation, and is not already part of the record of prior proceedings in the case. Hertz & Liebman, *Federal Habeas Corpus Practice and Procedure*, § 19.5, p. 795 (4th Ed. 2001).

Eisen was between a rock and a hard place. He could not have filed his after-discovered evidence claim until the conclusion of the federal habeas proceedings without risking federal review of his then-pending habeas claims or the after-discovered broadcast evidence due to the application of AEDPA and the decisions of this Court. Had Eisen simultaneously amended his habeas petition to include the new evidence of prosecutorial deceit and filed a second PCRA Petition, Eisen's entire federal proceeding would have been dismissed without prejudice for failure to exhaust state remedies pursuant to AEDPA's total exhaustion requirement. *See* 28 U.S.C. § 2254(b) (a court may not grant habeas relief unless "the applicant has exhausted the remedies available in the courts of the State."); *Rose v. Lundy*, 455 U.S. 509, 522 (1982). While Eisen later could have filed a new federal habeas claim relating to the after-discovered evidence, his initial federal habeas claims which he was litigating at the time of the broadcast in 2000 would have been barred by AEDPA's one year statute of limitations – 28 U.S.C. § 2244(d)(1) – since those claims would *not* have been tolled during their pendency in federal court. *See Duncan v. Walker*, 533 U.S. 167, 172-73, 179-80 (2001).

If Eisen had filed a second PCRA Petition within 60 days of discovery of the new evidence and not raised the new evidence in the ongoing federal habeas proceedings, he would not be able later to acquire federal review of the after-discovered evidence since that claim would be prohibited by AEDPA's rigid gatekeeping provisions for "second or successive" petitions. *See* 28 U.S.C. § 2244(b); *Adams v. United States*, 155 F.3d 582, 583 (2d Cir. 1998) (per curiam).

AEDPA requires that a "second or successive" petition be dismissed unless (a) the claim is based on a new rule of constitutional law made retroactive by the Supreme Court, or (b) the petitioner shows that the facts underlying the claim establish his innocence by clear and convincing evidence. 28 U.S.C. § 2244(b)(2)(A, B). Neither exception existed in Eisen's case. Thus, Eisen had only one chance for federal court review of his habeas petition (as Congress intended), and he had to include the newly discovered evidence in support of his case otherwise he would forego later federal review of that favorable evidence. *See id.*; *see also Slutzker v. Johnson*, 393 F.3d 373, 379 (3d Cir. 2004).

Had Eisen requested the federal court to issue an unprecedented stay of his then-existing habeas proceedings in order to bring a second PCRA petition, he risked that even if granted it would be overturned at the appellate level, resulting in the dismissal of the federal habeas under *Rose v. Lundy* as not fully exhausted. The limitations period would run, and all of Eisen's non-broadcast evidence habeas claims would become untimely. *See* 28 U.S.C. § 2254(b); *Slutzker*, 393 F.3d at 382-83. In 2000, "stay and abey" procedure was unsettled. *Slutzker*, 393 F.3d at 382. According to the Third Circuit, a habeas petitioner could have *requested* a stay, but "there was significant doubt that he would have received one, or that if he did it would be upheld on appeal." *Id.*, 393 F.3d at 382. The only federal appellate decision held that a district court lacked the power to stay habeas cases. *See Carmichael v. White*, 163 F.3d 1044 (8th Cir.1998). Not until *Crews v. Horn*, 360 F.3d 146 (3d Cir.2004), and *Rhines*, 544 U.S. 269, could a district court stay a federal habeas action and

hold a mixed petition in abeyance while a petitioner exhausted claims in state court. Before those cases were decided there was no Supreme Court or Circuit precedent approving "stay and abey." *Slutzker*, 393 F.3d at 383. As a result, Eisen could not have requested a stay of his unmixed petition in 2000 without risking outright dismissal of his habeas claims pending in federal court. To date, no court has permitted the stay of an unmixed petition. Eisen had no choice but to remain in federal court including through the appellate process.

Eisen's sole option to protect federal review of all of his habeas claims, and the one he chose, was to bring the videotape evidence to the attention of the federal court and to wait until the expiration of his federal habeas proceedings before returning to state court. Eisen's actions were completely consistent with AEDPA's goal of reducing "delays in the execution of state and federal criminal sentences." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). Further, the videotape evidence was intertwined with the matter already before the federal court and reviewed by the Pennsylvania Superior Court in its 1998 Opinion which hinged on whether the Prosecutor "misrepresented the Commonwealth's positions in the plea agreement," and whether Eisen "was deceived, misled, or misinformed with respect to the sentencing opinion." The introduction of this supplemental evidence in the federal habeas proceedings did not "fundamentally alter the legal claim already considered by the state courts," and therefore did not constitute a new unexhausted claim as the Magistrate found. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986) ("We hold merely that the supplemental evidence presented by respondent did not

fundamentally alter the legal claim already considered by the state courts, and, therefore, did not require that respondent be remitted to state court for consideration of that evidence.").

B. Pennsylvania Courts' Application Of PCRA Time Bar To Dismiss Eisen's Second PCRA Petition Violates Due Process.

After Eisen filed his second PCRA Petition, the state court ruled that it was barred by the 60-day limitation period for after-discovered evidence claims under 42 Pa. C. S. § 9545(b)(2). Court of Common Pleas Op. & Order of 4/22/04, at 4-5 (App. D). While Judge O'Toole recognized that filing a second PCRA petition in state court would have jeopardized the habeas corpus proceeding in federal court, and that Eisen was entitled to a new trial under the circumstances, he refused to grant relief under the PCRA due to the appellate courts' "stringent interpretation of the time-bar of the PCRA." *Id.* (quoting *Commonwealth v. Bennett*, 842 A.2d 953, 954 (Pa. Super. Ct. 2004), *rev'd*, 930 A.2d 1264, 1273 (Pa. 2007)). On appeal, the Pennsylvania Superior Court en banc affirmed the application of the 60-day time bar. Pa. Superior Court en banc Op. of 10/23/06, at 11-18, 24 (App. C). It maintained that "Eisen could have sought a stay of the federal court proceedings as he litigated his state court claim of after discovered evidence." *Id.*, at 24.

The application of the time bar to dismiss Eisen's PCRA Petition constitutes a stark violation of the Due Process Clause's guarantee of the opportunity to present claims "at a meaningful time and in a meaningful

manner." *See Logan*, 455 U.S. at 437. In assessing whether Eisen had this opportunity to present his after-discovered evidence claim at a meaningful time and manner in state court under the *Mathews* factors, this Court should find the liberty interest in collaterally attacking an unlawfully induced guilty plea substantially outweighs a state's interests in preventing stale and fraudulent claims or preserving government efficiency. *See Mathews*, 424 U.S. at 335. Moreover, application of the time bar fails to serve the interest against litigating stale or fraudulent claims because (1) the Petition was based on newly discovered evidence preserved on videotape and a resultant transcript, and thus there was no difficulty with the availability of witnesses or the memories of witnesses, (2) the Commonwealth was presented with and made aware of this evidence in 2000 when it was broadcast, and (3) Eisen undeniably had a valid claim that his guilty plea was a sham transaction and unlawfully induced, as the lower court readily found after a hearing regarding the newly discovered evidence. *See e.g. Burford v. Tennessee*, 845 S.W.2d 204, 209-210 (Tenn. 1992) (applying *Mathews* factors and concluding that lower court's application of post-conviction time bar constituted a denial of due process where petitioner was caught in a procedural trap).

The government's efficiency interest is especially unavailing in this post-conviction proceeding because "conventional notions of finality associated with civil litigation have less importance," and "'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'" *Burford*, 845 S.W.2d at 208-09 (citing *Sanders v. United*

States, 373 U.S. 1, 8 (1963), and quoting *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983)). Because the Commonwealth's interest in preventing litigation of stale and fraudulent claims is not served, and the Commonwealth's interest in efficiency does not outweigh Eisen's liberty interest in collaterally attacking his unlawfully induced guilty plea, the Superior Court's application of the time bar to dismiss Eisen's Petition violates the recognized due process requirement of an "opportunity for the presentation of claims at a meaningful time and in a meaningful manner." *See Logan*, 455 U.S. at 437; *Bennett*, 930 A.2d at 1273; *Burford*, 845 S.W.2d at 208-09; *see also Commonwealth v. Brown*, 943 A.2d 264, 272 (Pa. 2008) (dissent, J. Baer) ("Where statutory law, or our interpretation of same, leads to manifest constitutional violations, either the statute or our interpretation must yield.").

II. Review Is Warranted To Decide Whether A State Court Violates Equal Protection When It Applies A Time Bar To Dismiss A Second Post Conviction Petition Based On After-Discovered Evidence Where The Petitioner Could Not Have Filed The Petition Any Sooner Without Forfeiting Federal Review Of His Then-Existing Habeas Claims And The After-Discovered Evidence.

A State shall not deny any person "the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Equal Protection Clause requires state governments to treat similarly situated individuals in a similar manner. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). A State cannot make distinctions that burden a fundamental right, target a suspect class, or

intentionally, without a rational basis for doing so, treat one differently from others who are similarly situated. *See Vacco v. Quill*, 521 U.S. 793, 799 (1997). The Clause applies to post-conviction procedures. *See, e.g., Lane v. Brown*, 372 U.S. 477 (1963) (holding that State's conditioning the filing of a post-conviction petition based on the purchase of a trial transcript denied equal protection to indigent prisoners); *Smith v. Bennett*, 365 U.S. 708 (1961) (holding that State's filing fee requirement for habeas corpus petitions denied equal protection to indigent prisoners).

In this case, the Pennsylvania Courts treated Eisen differently from similarly situated individuals. In particular, the Superior Court en banc improperly applied the 60-day limitation for filing a claim of after-discovered evidence and dismissed Eisen's Petition as time-barred. Contrary to the Court's opinion, Eisen filed his Petition"within 60 days of the date the claim could have been presented" under 42 Pa. C. S. § 9545(b)(2). The Petition was filed within 60 days of the completion of the federal habeas proceedings. Filing any sooner would have jeopardized federal review of Eisen's then-existing habeas corpus claims or the after-discovered evidence.

The Superior Court's ruling contrasts with several decisions of the Pennsylvania Supreme Court that recognize that a delayed filing of a second PCRA petition nevertheless may be timely as having been filed "within 60 days of the date the claim could have been presented." *See, e.g., Bennett*, 930 A.2d at 1272 n.11 (permitting delayed filing where petitioner's lawyer allegedly failed to mail petitioner a copy of the court

order dismissing appeal); *Commonwealth v. Cruz*, 852 A.2d 287, 293 (Pa. 2004) (where prisoner attempted suicide, 60 day period for filing a second or successive petition did not begin to run until he became competent); *Commonwealth v. Lark*, 746 A.2d 585 (Pa. 2000) (holding that a petitioner seeking to file a second PCRA petition based on after-discovered evidence must wait until the final resolution of any pending PCRA in the state court system and file within 60 days thereof).

In addition, the Pennsylvania Supreme Court has refused to dismiss PCRA petitions due to a correctable defect in claim pleading or presentation, particularly where a petitioner reasonably relies on procedures which were available at the time of filing but subsequently overturned by intervening case law. *See, e.g.*, *Bennett*, 930 A.2d 1264 (refusing to dismiss a petition for post-conviction relief as untimely where the petitioner had reasonably relied on the availability of *nunc pro tunc* relief under an "extension theory" subsequently held to be unavailable); *Commonwealth v. McGill*, 832 A.2d 1014 (Pa. 2003) (recognizing that it may be appropriate for an appellate court to remand a defective PCRA petition for the proper pleading and/or presentation of claims where intervening case law has clarified PCRA standards); *Commonwealth v. Hernandez*, 817 A.2d 479 (Pa. 2003) (refusing to dismiss a petition for post-conviction relief as untimely when the petitioner had relied on a process to have his defaulted appellate rights reinstated *nunc pro tunc* and that process later was deemed unavailable by the Supreme Court). In sum, on occasion for constitutional or other

procedural reasons, the Pennsylvania Supreme Court has enlarged the time limit. The majority of decisions have clung to it as jurisdictional.[6]

In this case, the Superior Court provided no rationale for treating Eisen differently than the petitioners granted relief in the above mentioned cases. This lack combined with the Superior Court's disparate treatment of Eisen constitutes a denial of equal protection requiring redress. *See e.g., Cleburne Living Ctr.*, 473 U.S. at 439 (city ordinance prohibiting the operation of a group home for the mentally retarded constituted a denial of equal protection as city's discriminatory treatment of mentally retarded persons was not rationally related to a legitimate government purpose); *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336, 341 (1989) (county's real estate assessment system found to violate equal protection where recently purchased land was assessed according to the purchase price while land that had not been recently purchased was assessed on outdated values, resulting in "dramatic differences in valuation between petitioners' recently transferred property and otherwise comparable surrounding land.");

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6. One Justice of the Pennsylvania Supreme Court has acknowledged the often unconstitutional nature of the application of the PCRA time bar. *See Brown*, 943 A.2d at 272 (dissent, J. Baer) ("Ever since this Court construed the time limits provided by the [PCRA] as 'jurisdictional' [. . .], it has felt compelled to tolerate constitutional violation upon constitutional violation, sacrificing fundamental rights at the altar of finality. The United States and Pennsylvania Constitutions, however, do not countenance finality at the expense of constitutional rights, . . .").

Village of Willowbrook v. Olech, 528 U.S. 562, 564-565 (2000) (allegations that village intentionally demanded a 33-foot easement as a condition of connecting petitioner's property to the municipal water supply where the village required only a 15-foot easement from other similarly situated property owners was sufficient to state a claim for relief under traditional equal protection analysis).

Further, the Superior Court's ruling in this matter effectively punishes Eisen for exercising the fundamental right to pursue habeas corpus in the federal judicial system. When the application of a statute burdens a fundamental right, strict scrutiny applies. *Cleburne Living Ctr.*, 473 U.S. at 439-440. A government action will not survive strict scrutiny analysis unless the action was "suitably tailored" to serve a "compelling state interest." *Id.* (citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Graham v. Richardson*, 403 U.S. 365 (1971)).

The Superior Court's application of the PCRA time bar to dismiss Eisen's Petition burdened the writ of habeas corpus, a fundamental right of an individual citizen. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454 (1971); *see also Johnson v. Avery*, 393 U.S. 483, 485 (1969) (stating that "[t]his Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme . . . ."). The right is secured by the United States Constitution and it is the only common law writ to be explicitly mentioned. U.S. CONST. art. I., § 9, cl. 2.

When the television interviews were broadcast in 2000, Eisen faced the procedural dilemma of having to choose between federal habeas and state habeas remedies. Eisen stayed in federal court in an attempt to receive federal review of his then-existing habeas claims as well as of the after-discovered evidence of prosecutorial deceit. In doing so, Eisen fulfilled the procedural requirements of habeas corpus as governed by AEDPA, thereby exercising his fundamental right to seek the writ. The Superior Court's ruling that Eisen became time-barred from pursuing his state court post-conviction remedies because of his protected pursuit of federal habeas corpus remedies undeniably denied Eisen "'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *Lewis v. Casey*, 518 U.S. 343, 351 (1996) (quoting *Bounds v. Smith*, 430 U.S. 817, 825 (1977)). Since the Superior Court's decision burdens this fundamental right, strict scrutiny analysis applies and the government must prove that its actions were narrowly tailored to serve a compelling state interest. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002) (government's burden to meet both parts of the strict scrutiny test); *Johnson v. California*, 543 U.S. 499, 505-06 (2005) (under strict scrutiny standard of review, as applied to government-imposed racial classification challenged on equal protection grounds, government has burden of proving that classification is narrowly tailored measure that furthers compelling governmental interest); *M.L.B. v. S.L.J.*, 519 U.S. 102, 120-22 (1996) (holding that state statute requiring indigent mother whose parental rights were terminated to pay advance record preparation fees in order to prosecute appeal violated mother's equal protection and due process rights).

The denial of access to Pennsylvania Courts and the remedies of the PCRA cannot withstand strict scrutiny given the latitude on timeliness that Pennsylvania has afforded to some claimants whose justifications were constitutional or otherwise. To bar Eisen from state relief amounts to arbitrary discrimination against an individual who exercised a fundamental federal right in violation of the Fourteenth Amendment's guarantee of equal protection.

III. The Pennsylvania Court's Refusal To Permit Review Under The State's Post Conviction Relief Act Because Petitioner Had Pursued Review Under The Federal Habeas Statute Violates The Supremacy Clause.

The Supremacy Clause states: "This Constitution and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl.2. The Clause invalidates state laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden*, 6 L. Ed. 23 (1824) (Marshall, C.J.). When there is a conflict between federal law and the application of an otherwise valid state law, the Supremacy Clause requires that the federal law prevail. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-713 (1985); *Hamm v. City of Rock Hill*, 379 U.S. 306, 311-12 (1964). Moreover, the Supremacy Clause forbids a state from punishing an individual for exercising a federal right. *Coe v. County of Cook* 162 F.3d 491, 497 (7th Cir. 1998); *see also Hamm*, 379 U.S. at 311-12 (dismissing state law

convictions for trespass against civil rights "sit-in" participants because federal law guaranteed the participants the right to access to lunch counters).

The Pennsylvania courts effectively punished Eisen through the application of the 60-day time bar for exercising his fundamental right to habeas corpus. As stated previously, rather than lose federal review in 2000, Eisen reasonably waited until the expiration of the federal habeas corpus proceedings before filing a second PCRA petition in state court. The Trial Court and Superior Court dismissed Eisen's Petition pursuant to the PCRA's time limit which punished him severely for his decision to remain in federal court and exercise his right to habeas corpus. Punishment for the exercise of a federal right implicates the Supremacy Clause. *See e.g.*, *Hamm*, 379 U.S. at 311-12; *Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 371 (1990) (stating that "[t]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."); *Villot v. Varner*, 373 F.3d 327, 334 (3d Cir. 2004) (stating that "an interpretation of the procedural default rule that extended to state substantive restrictions on federal claims would violate the supremacy clause."); *see also Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (Supreme Court can scrutinize the application of state power where state acts solely through its judicial branch).

As in the instant case, the Supremacy Clause is breached when it is impossible to comply with both federal and state law, *Int'l Union, United Auto.*,

Aerospace and Agric. Implement Workers of America, UAW v. Johnson Controls, Inc., 499 U.S. 187, 209 (1991)), or where a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In 2000, Eisen simply could not have complied with both laws. Similarly, putting the matter in state court would have frustrated the Congressional purposes under AEDPA of stopping successive petitions, delay, and piecemeal litigation. *See Panetti v. Quarterman*, 127 S. Ct. 2842, 2854 (U.S. 2007); *Rhines*, 544 U.S. at 275-76.

IV. Review Is Necessary To Determine Whether A Federal Court May Stay An Unmixed Petition Based Solely On The Presentation Of Additional Evidence Supportive Of Existing Habeas Claims.

In response to arguments that the application of the time bar violated constitutional rights, the Pennsylvania Superior Court erroneously held for the first time that Eisen could have filed his second PCRA petition within 60 days and preserved federal habeas review "by filing a 'protective petition' in federal court and asking the federal court to stay and abey the federal *habeas* proceedings until state remedies are exhausted," relying on this Court's decisions in *Rhines* and *Pace*. *See* Pa. Superior Court en banc Op., at 14-18, 24-25 (App. C).[7] In effect, the Superior Court ruled that a

7. The Superior Court's retroactive application of 2005 decisions is contrary to all precedent. Retroactive application of a new appellate decision can occur only if the new ruling (Cont'd)

federal habeas corpus petitioner like Eisen who discovers during his federal habeas corpus proceedings new evidence supportive of an existing claim may request and receive from the federal district court a "stay and abey" and return to state court, even though the discovery of the supplemental evidence does not in the federal court's view convert the habeas petition from an unmixed petition to a mixed petition. Petitioner submits that the Superior Court's ruling is inconsistent with *Rhines* and *Pace* as well as the recognized purposes of AEDPA.

In *Rhines*, the issue was "whether a federal district court has discretion to stay the *mixed* petition to allow the petitioner to present his unexhausted claims to the state court in the first instance, and then to return to federal court for review of his perfected petition." 544 U.S. at 271-72 (emphasis added). This Court held that a district court may a stay a "mixed petition" but only in "limited circumstances." *Id.*, 544 U.S. at 278.

(Cont'd)

occurs during a petitioner's direct appeal. *See e.g.*, *Commonwealth v. Fowler*, 703 A.2d 1027, 1033 (Pa. 1997) (refusing to give retroactive application to cases in which the issue is raised in a collateral appeal pursuant to the PCRA); *Commonwealth v. Gillespie*, 516 A.2d 1180, 1183 (Pa. 1986) (holding that "a new rule of law to which we give full retroactive effect, will not be applied to any case on collateral review unless that decision was handed down during the pendency of an appellant's direct appeal and the issue was properly preserved there, or . . . is non-waivable."). Since *Rhines* and *Pace* were not handed down during the pendency of Eisen's direct appeal (there was none), the Superior Court was prohibited from giving those decisions retroactive effect, which is in accord with this Court's teachings. *See Teague v. Lane*, 489 U.S. 288, 309-10 (1989).

Unlike *Rhines*, Eisen presented an exhausted petition rather than a "mixed" petition. The Magistrate Judge specifically rejected the Commonwealth's position that Eisen had failed to exhaust his state remedies with respect to the broadcast evidence. After the presentation of the incremental broadcast evidence, since Eisen did not present a mixed petition, he was not eligible for a stay.[8] *See Rhines*, 544 U.S. at 278 (permitting stay of "mixed" petitions only); *see also Day v. McDonough*, 547 U.S. 198, 210 (2006) (noting that the Supreme Court first held in *Rhines* that a district court has discretion to stay only a "mixed" petition); *Morales v. Shannon*, 2007 WL 1877977, *6 (E. D. Pa. June 27, 2007) (stating that "neither the Supreme Court nor Court of Appeals for the Third Circuit has applied the stay-and-abeyance procedure to 'unmixed' petitions.").

Similarly, Eisen was not eligible for a stay under *Pace*, which held that a state post-conviction petition rejected by the state court as untimely is not "properly filed" and, thus, does not toll AEDPA's 1-year statute of limitations pursuant to 28 U.S.C. § 2244(d)(2). *Pace*, 544 U.S. at 410; *see also Allen v. Siebert*, 128 S. Ct. 2, 4 (U.S. 2007) (We therefore reiterate now what we held in *Pace*: "When a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)."). Not applicable to Eisen, *Pace* deals with whether an initial federal habeas petition has been tolled by pursuing state court remedies. It does not address

8. Eisen merely complied with pertinent federal rules and the decision whether a federal petition is mixed rests exclusively with the federal court. *See Blasi v. Attorney General of Com. of Pennsylvania*, 120 F. Supp. 2d 451, 464 (M.D. Pa. 2000).

whether a second state post conviction relief petition is timely where a party could not file that petition without forfeiting federal review of existing habeas claims or the newly discovered evidence.

The Superior Court actually relied on *Pace* dicta that a petitioner concerned about AEDPA's 1 year statute of limitations and whether his state post-conviction claim was "properly filed" for tolling purposes under § 2244(d)(2) could file a "'protective' petition in federal court and ask[] the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." *Pace*, 544 U.S. at 416-17 (citing *Rhines*, 544 U.S. at 278). Eisen had no concern about whether his state PCRA claim was "properly filed" for tolling AEDPA's statute of limitations. He had no reason under *Pace* to seek receipt of a stay and abey of a future federal habeas claim while he proceeded in state court with that same claim. *See id.* Furthermore, because Eisen did not present a mixed petition, he was not eligible for the stay of his habeas petition. *See Rhines*, 544 U.S. at 278; *Day v. McDonough*, 547 U.S. at 210.

The Superior Court's ruling also does not comport with AEDPA's purposes of furthering the principles of comity, federalism, and finality. "Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings." *Rhines*, 544 U.S. at 277. Permitting a habeas petitioner to stay his federal habeas proceedings and return to state court for yet another round of post-conviction proceedings based solely on the presentation of supplemental evidence supportive of an existing claim "does not

conserve judicial resources, 'reduc[e] piecemeal litigation,' or 'streamlin[e] federal habeas proceedings.'" *Panetti*, 127 S. Ct. at 2854 (quoting *Burton v. Stewart*, 127 S.Ct. 793, 797 (U.S. 2007) (per curiam)).

Equally problematic is the present quandary of petitioners and their attorneys. It is inevitable that small amounts of new evidence will emerge in some cases that are quite old while they are under federal review. For example, death penalty statistics constantly are evolving. In situations where information arises that does not constitute a new claim, and where a federal court indicates that there is no procedural default or non-exhaustion, should petitioners return to state court? Some prisoners, such as death penalty petitioners desiring delay, may find the course suggested by the Pennsylvania Courts attractive. Others, such as Eisen, who do not wish to lose federal review of existing claims and additional information will be disadvantaged. Given the present apparent divergence between the state court approach *sub judice* and the countervailing federal court view of AEDPA under the habeas rules, no one currently has notice of the correct course to take when facing Eisen's dilemma.

CONCLUSION

For all the foregoing reasons, Petitioner Eisen respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT DECIDED MARCH 24, 2008

[J-11A-B-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Nos. 28-29 WAP 2007

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

ERIC EISEN,

Appellant

Appeal from the Order of the Superior Court entered October 23, 2006, at Nos. 679 WDA 2004 and 885 WDA 2004, vacating the Orders of the Court of Common Pleas of Allegheny County, entered April 22, 2004 at Nos. CP-02-CR-0002685-1993 and CP-02-CR-0004232-1993.

ARGUED: March 5, 2008

ORDER

PER CURIAM **DECIDED: March 24, 2008**

The appeal is dismissed as having been **IMPROVIDENTLY GRANTED.**

Appendix A

Madame Justice Todd did not participate in the consideration or decision of this case.

Judgment Entered March 24, 2008

s/ John A. Vaskor
Deputy Prothonotary

APPENDIX B — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT DATED OCTOBER 18, 2007

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

Nos. 609 & 610 WAL 2006

COMMONWEALTH OF PENNSYLVANIA,

Respondent

v.

ERIC EISEN,

Petitioner

Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 18th day of October, 2007, the Petition for Allowance of Appeal is **GRANTED, LIMITED TO** the issue set forth below. Allocatur is **DENIED** as to all remaining issues. The issue, as stated by petitioner, is:

> Whether a second PCRA petition invoking the after-discovered evidence exception to the

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PCRA's one year filing requirement was filed "within 60 days of the date the claim could have been presented" under 42 Pa.C.S. § 9545 where the petition was filed within 60 days of the conclusion of Petitioner's federal *habeas corpus* proceedings and where the filing of the petition prior to the conclusion of the federal proceedings would have jeopardized the Petitioner's federal review of his then-existing *habeas corpus* claims and/or his after-discovered evidence claim.

APPENDIX C — MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA FILED OCTOBER 23, 2006

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 679 WDA 2004

COMMONWEALTH OF PENNSYLVANIA,

Appellant

v.

ERIC EISEN,

Appellee

Appeal from the Order entered on April 22, 2004
in the Court of Common Pleas of Allegheny County,
Criminal Division, Nos. CC 1993-02685;
CC 19993-04232

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 885 WDA 2004

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ERIC EISEN,

Appellant

Appendix C

Appeal from the Order entered on April 22, 2004
in the Court of Common Pleas of Allegheny County,
Criminal Division, Nos. CC 1993-02685;
CC 19993-04232

BEFORE: HUDOCK, MUSMANNO, ORIE MELVIN, TODD, KLEIN, BENDER, BOWES, GANTMAN and PANELLA, JJ.

MEMORANDUM: FILED: OCTOBER 23, 2006

In this appeal and cross-appeal, Eric Eisen ("Eisen") and the Commonwealth of Pennsylvania challenge the Order of the Court of Common Pleas of Allegheny County, which denied Eisen relief under the Post Conviction Relief Act ("PCRA"),[1] but granted Eisen relief under Pennsylvania's *habeas corpus* statute.[2] Specifically, the common pleas court vacated Eisen's guilty plea and granted him a trial. We vacate the Order of the common pleas court and reinstate Eisen's judgment of sentence.

During the evening of February 8, 1993, the North Fayette Township police department received a call that shots had been fired near 50 Old Branch Road in North Fayette Township. As Officer Mark O'Donnell investigated the area, he noticed a red Honda Prelude, which was occupied by Eisen and James Smith

1. 42 Pa.C.S.A. §§ 9541-9546.

2. 42 Pa.C.S.A. § 6501-6505.

("Smith"). The vehicle started to leave the area at a very high rate of speed. Officer O'Donnell stopped the Honda, approached the vehicle, and began to question Eisen, the driver. During their discussion, Officer O'Donnell noticed a pair of latex gloves on the floor of the passenger side of the vehicle. The gloves appeared to have blood on them. In addition, the officer observed mud and dirt on the clothing of Eisen and Smith, and blood smeared on the trunk of the car.

Officer O'Donnell ordered the men out of the vehicle. Thereafter, Eisen admitted that there was a body in the trunk of the car. Inside of the trunk, police discovered the body of Daniel Bostedo ("Bostedo"). A search of Bostedo's clothing revealed two hundred and eighty-nine dollars in his pocket, and four thousand dollars folded and wrapped in his sock. The cause of death was determined to be a close range shotgun wound to the left side of Bostedo's neck.

Both Smith and Eisen subsequently stated that they had planned to rob Bostedo. In accordance with the plan, Eisen met Bostedo in Pittsburgh. Eisen then drove Bostedo to a remote location, where the two began walking away from the vehicle. As the two were walking, Smith, who was hiding in the trunk of the car, exited the vehicle. Smith pointed a gun at Bostedo, after which a single shot was fired, killing Bostedo. Both Smith and Eisen indicated that Bostedo had tried to hide behind Eisen. Eisen then pushed Bostedo away, at which time the gun went off. Both men asserted that they had planned to rob, but not kill, Bostedo.

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On May 23, 1994, Eisen pled guilty to second degree murder, robbery, and criminal conspiracy.[3] William Manifesto, Esquire ("Manifesto") represented Eisen at the time of his plea. W. Christopher Conrad ("Conrad"), the Deputy District Attorney at the time, prosecuted the case. Pursuant to a negotiated plea agreement between the Commonwealth and Eisen, Eisen pled guilty to the charges in exchange for a sentencing exhibit, which set forth certain facts, favorable to Eisen, to be used in the event that Eisen later sought commutation of his sentence. Also, in accordance with the plea agreement, the trial court sentenced Eisen to life in prison on May 23, 1994. Eisen did not file a direct appeal of his judgment of sentence.

On December 28, 1995, Eisen filed his first PCRA Petition, claiming that his guilty plea had been unlawfully induced. After a hearing and argument, the PCRA court granted the Petition, vacated Eisen's guilty plea, and awarded him a new trial. The Commonwealth filed a timely appeal. In a Memorandum and Order dated May 19, 1998, this Court reversed the Order of the PCRA court. Eisen filed a Petition for allowance of appeal, which the Pennsylvania Supreme Court denied. ***See Commonwealth v. Eisen***, 723 A.2d 230 (Pa. Super. 1998), ***appeal denied***, 571 W.D. Allocatur Docket 1998 (Pa., filed December 1, 1998).

On October 1, 1999, Eisen filed a Petition for writ of *habeas corpus* in the United States District Court for

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3. 18 Pa.C.S.A. §§ 2501, 3701, 901.

the Western District of Pennsylvania. In his federal Petition, Eisen again challenged the validity of his guilty plea. The Commonwealth filed an Answer to the Petition. In its Opinion, the PCRA court described the history of this federal filing as follows:

> While the Petition was pending in District Court, in February 2000, a local television station aired an investigative report concerning [Eisen's] guilty plea. In this report, it was revealed that the victim's mother only accepted the plea agreement reluctantly because the prosecutor informed her that neither [Eisen] nor [Smith] would ever get out of jail. In addition, it was revealed that the prosecutor did not believe that the "Sentencing Exhibit" would ever "mean anything in the world."
>
> [Eisen] sought to amend his Petition in District Court to include this after-discovered evidence. The request was never acted upon nor addressed by Magistrate Judge Kenneth Benson, who recommended in a January 2, 2001 Report and Recommendation that [Eisen's] Petition be dismissed and that a certificate of appealability be denied. The Report and Recommendation were adopted by the District Court on April 5, 2002 and the Court declined to issue a certificate of appealability. [Eisen] appealed the denial of the certificate of appealabilty to the Court of

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> Appeals for the Third Circuit, which affirmed the denial on February 24, 2003 and denied a Petition for Rehearing on June 26, 2003. [Eisen] then filed a Petition for Writ of *Certiorari* to the United States Supreme Court, which was denied on January 10, 2004.

PCRA Court Opinion, 4/22/04, at 1-3.

Eisen filed this, his second PCRA Petition on August 25, 2003. The second PCRA Petition again claimed that Eisen's guilty plea had been unlawfully induced. In this Petition, Eisen asserted that Conrad committed prosecutorial misconduct by misrepresenting the value of the sentencing exhibit during negotiations for his guilty plea. According to the Petition, "[s]ince Eisen did not know the Commonwealth's true and undisclosed knowledge that the plea bargain including . . . the sentencing exhibit was valueless, he could not possibly have waived his rights knowingly, voluntarily and intelligently." PCRA Petition, 8/23/03, at ¶ 83. Eisen's Petition further asserted that Eisen did not discover Conrad's misconduct until Conrad revealed, in a television interview, that Conrad knew that the sentencing exhibit was worthless at the time of the plea.[4]

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4. At the PCRA hearing, Eisen's plea counsel, Manifesto, testified regarding his belief that the sentencing exhibit would enhance Eisen's chance of being granted gubernatorial clemency. N.T., 1/16/04, at 19. Manifesto further testified that he did not know that Conrad previously had made representations to Bostedo's family that Conrad thought that the sentencing exhibit was worthless. *Id.* at 26.

On this basis, Eisen sought PCRA relief or, in the alternative, *habeas corpus* relief.

By an Order and Opinion dated April 22, 2004, the common pleas court concluded that Eisen's PCRA Petition was untimely filed. Common Pleas Court Opinion, 4/22/04, at 4. However, the common pleas court also determined that Eisen's guilty plea had been unlawfully induced. **Id.** Because Eisen could not seek relief through the PCRA, the common pleas court vacated Eisen's guilty plea and granted him a new trial pursuant to Pennsylvania's *habeas corpus* statute.[5] Both the Commonwealth and Eisen filed timely appeals from that Order.

The Commonwealth presents the following issue for our review:

> 1. Whether the [common pleas] court erred in granting post-conviction relief pursuant to the state *habeas corpus* statute, after finding that the petition was time-barred under the [PCRA]?

Brief for the Commonwealth at 4.

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5. A petition for a writ of *habeas corpus* "lies to correct void or illegal sentences or an illegal detention, or where the record shows a trial or sentence or plea so fundamentally unfair as to amount to a denial of due process or other constitutional rights, or where for other reasons the interests of justice imperatively required it." ***Commonwealth ex rel. Butler v. Rundle,*** 180 A.2d 923, 924 (Pa. 1962) (citation omitted).

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In his cross-appeal, Eisen presents the following issues:

1. Whether the [common pleas] court acted properly when it vacated the guilty plea and granted a new trial under the state *habeas corpus* statute where the PCRA failed to provide a remedy?

2. Whether the [common pleas] court acted properly when it dismissed Eisen's PCRA petition as untimely?

3. Whether the PCRA time limits violate due process?

4. Whether the time limitations contained in the PCRA constitute a statute of limitations to which equitable tolling principles may apply?

5. Whether equitable tolling principles should apply to a PCRA petition where the petitioner did not have a meaningful opportunity to present his claim, the application of state law violates the Supremacy Clause, government officials interfered with the presentation of the claim, the petitioner did not have either a notice process or a waiver process before relinquishing his appellate rights, the government by denying the

petitioner's trial rights implicitly supported a prosecutor who abused his quasi-judicial role, and the guilty plea subject matter of the PCRA petition was a sham transaction and a violation of basic contractual principles?

6. Whether a petition for post-conviction relief is an illegal sentence claim which is unwaivable and may be reviewed at any time by the Sentencing Court to correct an illegal sentence?

Brief for Appellee/Cross-Appellant at 4-5.[6]

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6. In addition, upon accepting this case for reargument *en banc*, we have asked the parties to file supplemental briefs addressing the following two issues:

1. Whether, based on due process concerns and the Supremacy Clause, the common pleas court erred in finding that the PCRA's sixty-day time bar for after-discovered evidence began to run during the pendency of Eisen's then-existing federal *habeas corpus* proceedings?

2. Whether based on the plain language of the statute, Eisen did not have a remedy under the PCRA because he could not plead that he did not commit the crime or that he "is innocent" and, thus, he was entitled to collateral review of his unlawfully induced guilty plea pursuant to the writ of *habeas corpus?*

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The Commonwealth asserts that the common pleas court erred in granting Eisen *habeas corpus* relief where the claim could have been brought under the PCRA, but was untimely filed. ***See*** 42 Pa.C.S.A. § 9545 (providing mandatory timeliness requirements for a PCRA petition). According to the Commonwealth, the common pleas court properly determined that Eisen's claim for relief was time-barred. Eisen counters that his Petition for relief should be deemed timely filed, on the basis of equitable principles, because he filed it within 60 days of the conclusion of his federal *habeas corpus* proceedings. ***See*** Reply Brief of Appellee Eisen on Reargument *En Banc,* at 7. Because the timeliness of Eisen's PCRA Petition implicated the common pleas court's jurisdiction, we will address this issue first.

Initially, we note that under the PCRA, Eisen was required to file his second PCRA Petition within one year of the date that his judgment of sentence became final, unless one of three statutory exceptions applies. 42 Pa.C.S.A. 9545(b)(1). The one-year time limitation is jurisdictional and a trial court has no power to address the substantive merits of an untimely filed petition. ***Commonwealth v. Abu-Jamal,*** 833 A.2d 719, 723-24 (Pa. 2003); ***Commonwealth v. Gamboa-Taylor,*** 753 A.2d 780, 783 (Pa. 2000).

Nonetheless, the merits of Eisen's Petition may be considered if it falls within one of the three exceptions to the PCRA's timeliness requirements, as elucidated

in section 9545(b)(1) of the PCRA. That section provides as follows:

> Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
>
> (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
>
> (i) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held to apply retroactively.

42 Pa.C.S.A.§ 9545(b)(1). Any petitioner asserting one of these exceptions must establish that the exception

was raised within sixty days of the date the claim could have been first presented. 42 Pa.C.S.A. § 9545(b)(2).

In the instant case, Eisen's judgment of sentence became final in June 1994. Although the PCRA provides a grace period for the filing of a first PCRA petition where the conviction became final before the effective date of the amendments to the PCRA,[7] this is Eisen's second PCRA Petition. The PCRA provides no grace period for the filing of a second PCRA Petition. ***Peterkin,*** 622 A.2d at 641.

Eisen filed the instant PCRA Petition on August 25, 2003, more than one year after his judgment of sentence became final. Accordingly, Eisen's PCRA Petition is untimely on its face. Eisen argues, however, that his claim falls within the PCRA's timeliness exceptions for governmental interference and after-discovered evidence. ***See*** 42 Pa.C.S.A. §§ 9545(b)(1)(i), (ii).

Eisen contends that the 60-day period for filing a PCRA petition based upon the exceptions to the PCRA's timeliness requirements should have begun to run at the conclusion of his federal *habeas corpus* proceedings. This case raises the issue of the interplay between the 60-day time period imposed by section 9545(b)(2) of the

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7. ***See Commonwealth v. Peterkin,*** 722 A.2d 638 (Pa. 1998) (holding that where the petitioner's conviction became final before the effective date of the amendments to the PCRA, *i.e.*, January 16, 1996, a PCRA petition, in order to be timely, must be filed within one year of the effective date of the amendments).

PCRA, and the time period for filing a federal *habeas corpus* petition. Eisen asserts that the application of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("ATEDPA"), 28 U.S.C.A. § 2241 *et seq.*, which imposes a time limitation for filing of federal *habeas corpus* petitions forced him to choose between pursuing his case in federal court or filing a petition under the PCRA. We disagree.

The ATEDPA provides, in pertinent part, as follows:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of *habeas corpus* by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A)-(D).

In the instant case, Eisen claimed governmental interference by the prosecutor and after-discovered evidence of prosecutorial misconduct in the guilty plea process. Accordingly, under section 2244, Eisen was required to file his federal *habeas corpus* petition within one year of the date on which the factual predicate of these claims could have been discovered through the exercise of due diligence. ***See*** 28 U.S.C. § 2244(d)(1)(D). Eisen filed his federal *habeas corpus* Petition on October 1, 1999. Conrad's statements regarding the sentencing exhibit were televised on February 11 and 25, 2000. On June 26, 2000, Eisen filed a Motion in federal court regarding the televised statements by Conrad.

Eisen claims that the 60-day time period for filing his PCRA Petition in state court, after Conrad made his televised statements, should have been tolled while he pursued his claim for federal *habeas corpus* relief. Eisen asserts that

> at the time of Eisen's discovery and motion to introduce the broadcast evidence the statute of limitations [for his federal petition] had run, thus his federal *habeas* petition would have been dismissed as containing an unexhausted claim and his claims not based on the broadcast evidence would have been forever barred by the 1 year statute of limitations under § 2244(d).

Refiled Reply Brief of Appellee Eisen at 15. According to Eisen, he had to include his claim based on Conrad's televised statements in his first federal *habeas corpus* proceeding because a second *habeas corpus* petition in federal court would have been subject to the stringent requirements of 28 U.S.C. § 2244(b).

Section 2244(b) of the United States Code requires that a petitioner filing a second or successive federal *habeas corpus* application show that "the facts underlying the claim, if proven . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). Eisen argues that because it is unlikely that he could meet this burden,

raising his claim based on Conrad's statements in a subsequent proceeding essentially would have denied him the opportunity to receive any federal review of the broadcast evidence claim. Refiled Reply Brief of Appellee Eisen at 16.

Eisen also asserts that had he filed a PCRA Petition while the federal *habeas corpus* Petition was pending, the federal petition could have been dismissed because Eisen had not exhausted his state court remedies with regard to the broadcast evidence claim. On this basis, Eisen asserts that the PCRA's 60-day time limit asserting the governmental interference and after-discovered evidence exceptions to the PCRA timeliness provisions should have been tolled until the conclusion of the federal proceedings.

In reviewing Eisen's claim, we recognize that the Pennsylvania Supreme Court has rejected attempts to equitably toll the PCRA's timeliness provisions. The Pennsylvania Supreme Court has expressly held that the "period for filing a PCRA petition is not subject to the doctrine of equitable tolling;" instead, the time for filing a PCRA petition can be extended only by operation of one of the statutorily enumerated exceptions to the PCRA time-bar. ***Commonwealth v. Fahy,*** 737 A.2d 214, 222 (Pa. 1999).

In ***Fahy,*** in 1983, a jury had convicted Henry Fahy ("Fahy") of murder in the first degree, rape, burglary, and possession of an instrument of crime. Fahy was sentenced to death. The Pennsylvania Supreme Court

affirmed Fahy's judgment of sentence on October 21, 1986. At issue in ***Fahy*** was the denial of Fahy's fourth Petition for PCRA relief. On appeal, Fahy attempted to invoke the principle of equitable tolling as a basis for the Pennsylvania Supreme Court to conclude that his petition was timely filed under the PCRA. In support of his position, Fahy cited ***Lovasz v. Vaugh,*** 134 F.3d 146 (3d Cir. 1998), wherein the United States Court of Appeals for the Third Circuit held that the time for filing a writ of *habeas corpus* in the federal system was deemed tolled while a petitioner pursued his PCRA remedies in the Pennsylvania courts. According to Fahy, comity required that the time for filing his PCRA petition be tolled while Fahy pursued his federal *habeas corpus* remedies.

The Pennsylvania Supreme Court expressly rejected Fahy's argument. Distinguishing ***Lovasz***, the Court opined as follows:

> In ***Lovasz***, the Third Circuit held that a state petition for post-conviction relief tolled the time requirements for filing a writ of habeas corpus under. 28 U.S.C. § 2254. ***Lovasz*** is easily distinguished. First, the ***Lovasz*** court was interpreting the [ATEDPA], which contains a specific section as to tolling. 28 U.S.C. § 2244(d). Section 2244(d) does not include for purposes of time computation the period during which a properly filed application for state post-conviction or other collateral review with respect to the judgment

> is pending. The PCRA contains no analogous provision regarding application for federal *habeas corpus* relief. Additionally, the ***Lovasz*** court emphasized that pursuant to the exhaustion doctrine, it was the policy of the federal system that the states should have the first opportunity to address and correct alleged violations of a state prisoner's federal rights . . . . The same policy concerns are not implicated in the reverse situation. To allow tolling of the PCRA's time limitations where a writ for federal *habeas* relief has been filed would undermine the federal policy of initial state review, and in fact, would encourage initial review in the federal system. [Fahy's] equitable tolling argument is without merit.

Fahy, 737 A.2d at 222-23.

The holding in ***Fahy*** is consistent with the United States Supreme Court's statements regarding the purpose of the federal *habeas corpus* statute. In ***Rhines v. Weber,*** 544 U.S. 269 (2005), the defendant was convicted in a South Dakota court on charges including first-degree murder. The defendant was sentenced to death, and was unsuccessful both on direct review and in state *habeas corpus* proceedings. In 2000, the defendant filed a then-timely federal *habeas corpus* petition in the United States District Court for the District of South Dakota. However, after the ATEDPA's limitations period had run, the District Court held that some of the accused's claims had not been exhausted in

state court. The accused therefore filed a motion requesting that the District Court hold his pending federal *habeas corpus* petition in abeyance, while he presented his unexhausted claims to the South Dakota courts. The District Court (1) granted the motion, and (2) issued a stay conditioned upon the defendant's commencing state-court proceedings. ***Id.*** at 273.

On appeal, the United States Court of Appeals for the Eighth Circuit vacated the stay and ordered a remand. In so holding, the Eighth Circuit opined that Court of Appeals precedent precluded the District Court from staying the defendant's exhausted claims while he sought state post-conviction relief on unexhausted claims. ***Rhines v. Weber,*** 346 F.3d 799, 801 (8th Cir. 2003).

On *certiorari,* the United States Supreme Court vacated and remanded. The Supreme Court explained the dilemma faced by federal petitioners as follows.

> As a result of the interplay between ATEDPA's 1-year statute of limitations and ***[Rose v.] Lundy's***[8] dismissal requirement,

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8. ***Rose v. Lundy,*** 455 U.S. 509 (1982). The United States Supreme Court rendered its decision in ***Lundy*** fourteen years before Congress enacted the ATEDPA. In ***Lundy,*** the Supreme Court held that federal district courts may not adjudicate mixed petitions for *habeas corpus,* that is, petitions containing both claims where the petitioner had exhausted his state court remedies and claims where he had not. The Supreme Court reasoned that the interests of comity and federalism dictated that state courts must have the first opportunity to decide a petitioner's claims. ***Id.*** at 518-19.

petitioners who come to federal court with "mixed" petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims. If a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under ***Lundy*** after the limitations period has expired, this will likely mean the termination of any federal review. For example, if the District Court in this case had dismissed the petition because it contained unexhausted claims, ATEDPA's 1-year statute of limitations would have barred Rhines from returning to federal court after exhausting the previously unexhausted claims in state court. Similarly, if a district court dismisses a mixed petition close to the end of the 1-year period, the petitioner's chances of exhausting his claims in state court and refiling his petition in federal court before the limitations period runs are slim. The problem is not limited to petitioners who file close to the ATEDPA deadline. Even a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion. Thus, whether a petitioner ever receives federal review of his claims may turn on which district court happens to hear his case.

Rhines, 544 U.S. at 275.

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In ***Rhines,*** the United States Supreme Court noted that the ATEDPA's one-year limitation period was enacted against the backdrop of the total exhaustion requirement imposed by ***Lundy***.

> ATEDPA thus encourages petitioners to seek relief from state courts in the first instance by tolling the 1-year limitations period while a "properly filed application for State post-conviction or other collateral review" is pending. 28 U.S.C. § 2244(d)(2). This scheme reinforces the importance of ***Lundy's*** "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." ***Lundy,*** 455 U.S. at 520 . . . .

Rhines, 544 U.S. at 276-77. As a result, the United States Supreme Court held in ***Rhines*** that "federal courts that are presented with a mixed petition may either dismiss the petition without prejudice to allow the petitioner to exhaust previously unexhausted claims or may 'stay the petition and hold it in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims.'" ***Id.*** at 276-77.

However, in ***Pace v. DiGuglielmo,*** 544 U.S. 408 (2005), a federal *habeas corpus* petitioner argued that a petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out that his state petition was not "properly filed," as required by section 2244, and thus that his federal

habeas corpus petition is time-barred. ***Id.*** at 416. Addressing this situation, the Supreme Court in ***Pace*** opined that "[a] prisoner seeking state postconviction relief might avoid this predicament . . . by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal *habeas* proceedings *until state* remedies are exhausted." ***Id.*** (citation omitted). The Court further held that "[a] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court." ***Id.***

In summary, the Pennsylvania Supreme Court has rejected the application of equitable tolling to the timeliness provisions of the PCRA. The Pennsylvania Supreme Court's holdings in this regard are consistent with the holdings of the United States Supreme Court. Specifically, where a federal *habeas corpus* petition has presented both claims that have been exhausted in state court and claims that have not, the federal district court may stay and abey the federal proceedings until the petitioner exhausts his state court remedies. However, federal law generally requires that a prisoner exhaust his or her state court remedies prior to seeking relief in the federal courts.

Keeping the above holdings in mind, we conclude that Eisen's PCRA Petition was not subject to equitable tolling of the PCRA's timeliness requirements. Eisen was required to file his claim of after-discovered evidence within 60 days of the date that the claim could have been first brought. 42 Pa.C.S.A. § 9545(b)(2). Eisen became aware of Conrad's televised statements in February

2000. Clearly, Eisen's PCRA Petition, which he filed on August 25, 2003, was not filed within the 60-day time limit. On this basis, we conclude that Eisen's PCRA Petition was not timely filed.

As set forth above, the Commonwealth asserts that the common pleas court erred in granting Eisen state *habeas corpus* relief because the claim could have been brought under the PCRA, but was untimely filed. The common pleas court sought to avoid the timeliness provisions of the PCRA by holding that Eisen could not present his claim under the provisions of the PCRA because he did not assert his innocence. ***See*** 42 Pa.C.S.A. § 9543(a)(2)(iii) (stating that in order to be eligible for relief under the PCRA, a petitioner must plead and prove that his conviction or sentence resulted from an unlawfully induced guilty plea "where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent"). Based upon Eisen's failure to assert his innocence, the common pleas court concluded that the PCRA afforded no remedy for Eisen's claim. Accordingly, we next will address whether the PCRA provides a remedy for Eisen's claim.

The PCRA explicitly states that it "shall be the sole *means* of obtaining collateral relief" and that its provisions "encompass[] all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including *habeas corpus* and *coram nobis.*" 42 Pa.C.S.A. § 9542 (emphasis added). Under the plain words of the statute, if the underlying

substantive claim is one that could potentially be remedied under the PCRA, that claim is exclusive to the PCRA. ***Commonwealth v. Eller***, 807 A.2d 838, 845 (Pa. 2002). It is only where the PCRA does not encompass a claim that other collateral procedures are available. ***Commonwealth v. Pagan***, 864 A.2d 1231, 1233 (Pa. Super. 2004).

To determine whether the relief Eisen seeks is governed by the law of *habeas corpus* or whether it is subsumed by the PCRA, we must "test whether [Eisen] had a remedy under the PCRA," and "we must consider the PCRA itself as applied to [Eisen's] case." ***See Peterkin***, 722 A.2d at 640. To be eligible for relief under the PCRA, the petitioner must prove by a preponderance of the evidence the conviction or sentence resulted from, *inter alia*,

> [a] plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent.

42 Pa.C.S.A. § 9543(a)(2)(iii).

Here, Eisen's PCRA Petition asserted that prosecutorial misconduct unlawfully induced his guilty plea. According to Eisen's Petition,

> [i]n February 2000, [Conrad] . . . revealed in a television interview information to the effect that he engaged in prosecutorial misconduct

> intended to trick Eisen into agreeing to what turned out to be a valueless and meaningless guilty plea. . . . In a companion television interview, the decedent victim's mother also spoke about a promise [made] by Conrad that indicates the likelihood of prosecutorial misconduct.

Id. at ¶¶ 29, 30. Eisen averred that these televised revelations demonstrated prosecutorial misconduct in the plea process, and corroborated what he had claimed since 1994, "that Conrad seriously misrepresented the value of a plea bargain to Eisen." ***Id.*** at ¶ 32. Based upon these allegations, Eisen claimed that his plea was unlawfully induced. ***Id.*** at ¶ 33.

In support of his claim, Eisen asserted that "[t]he [television] broadcasts constitute[d] new and compelling evidence that the Commonwealth knew it was offering nothing of value to Eisen in return for Eisen giving up his constitutional right to a jury trial," and that the newly obtained evidence "is likely to compel a court to grant withdrawal of the plea and to order Eisen to stand trial or undergo new plea negotiations where the Commonwealth proceeds in good faith and complete candor." ***Id.*** at ¶¶ 55, 81. Eisen's PCRA Petition, however, did not specifically assert Eisen's innocence.

Although Eisen's Petition did not assert his innocence, we must consider the PCRA as applied to Eisen's case. ***See Peterkin***, 722 A.2d at 640. A review of the certified record discloses that Eisen's first PCRA

Petition asserted an unlawfully induced guilty plea. Eisen specifically challenged the value of the sentencing exhibit, albeit on a different basis. Eisen's first PCRA Petition averred that his plea counsel had rendered ineffective assistance by

> [m]isadvising [Eisen] and his family that the Commonwealth's tender of a sentencing exhibit to the trial court after the plea had been entered, which "documented" what took place at the plea hearing for clemency consideration in the future, was valuable consideration offered in exchange for a plea to life imprisonment without parole, and would substantially influence a gubernatorial clemency decision; and . . . [m]isadvising [Eisen] to accept essentially worthless consideration from the Commonwealth (the tender of said sentencing exhibit) in exchange for his plea to life imprisonment without parole.

PCRA Petition, 12/28/95, at ¶¶ 11(A)(1)(e), (f).

In addition, our review discloses that Eisen's first PCRA Petition asserted his innocence of the crime of second degree murder.[9] In this regard, Eisen's Petition asserted the following:

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9. We note that the 1988 version of the PCRA did not require that a petitioner challenging his guilty plea assert his innocence.

a. The facts of record at the plea hearing were silent as to the *corpus delicti* of the robbery and, therefore, the felony-murder, as there was no evidence of an attempt to take money from the victim and thousands of dollars were found on the victim after the killing;

b. The facts indicated that [Eisen] did not intend to commit a robbery, but only intended to commit a theft-by-deception; and

c. The facts of record established a defense to second degree murder because [Eisen] was not the shooter and the killing of the victim by the co-defendant was accidental in that the shooter did not pull the trigger and did not kill "in furtherance of the underlying felony," an essential element of second degree murder.

PCRA Petition, 12/28/95, at ¶ 11(B)(1)(a)-(c).

Thus, Eisen's first PCRA Petition alleged that his plea counsel misrepresented the value of the sentencing exhibit; the misrepresentation resulted in an unlawful plea; and the facts did not establish the crime of second degree murder. Eisen's second PCRA Petition asserted that Conrad knowingly misrepresented the value of the sentencing exhibit, and that the misrepresentation resulted in an unlawful plea. Although Eisen's second

PCRA Petition did not assert his innocence, we conclude that the PCRA provides Eisen with a remedy, under the circumstances of this case. Eisen cannot foreclose PCRA relief merely by omitting his assertion of innocence, an assertion that he made in his prior PCRA Petition. Because the PCRA provides Eisen with a remedy for his claim that Conrad misrepresented the value of the sentencing exhibit, we conclude that the common pleas court erred when it granted Eisen relief under Pennsylvania's *habeas corpus* statute.

Eisen's remaining claims assert that the common pleas court improperly ruled that his PCRA Petition was untimely filed. Eisen's Petition asserted the government interference and after-discovered evidence exceptions to the PCRA's timeliness requirement. As set forth above, we reject Eisen's claim that his PCRA Petition should be considered timely filed because he filed it within 60 days of the conclusion of his federal *habeas corpus* proceedings. In addition, the record discloses that Eisen did not file his PCRA Petition within 60 days of February 11, 2000 or February 25, 2000, the dates of Conrad's broadcasted statements. Accordingly, the common pleas court did not err in determining that the PCRA Petition was untimely filed.

Eisen also argues that compliance with the timeliness requirements of the PCRA would violate his right to due process. According to Eisen, he could not present his claim in 2000 because of his then-pending federal *habeas corpus* Petition. Again, as set forth *supra*, we conclude that this claim lacks merit. Eisen

could have sought a stay of the federal court proceedings as he litigated his state court claim of after-discovered evidence. ***See Pace,*** 544 U.S. at 416 (stating that "[a] prisoner seeking state post-conviction relief might avoid this predicament... by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal *habeas* proceedings until state remedies are exhausted"). Accordingly, Eisen is not entitled to relief on this basis.

Eisen also claims that strict compliance with the PCRA's time limitations would violate the Supremacy Clause of the United States Constitution. Recently, the Pennsylvania Supreme Court summarized the law regarding the Supremacy Clause as follows:

> The Supremacy Clause of the United States Constitution prohibits states from enacting laws that are contrary to the laws of our federal government.... It is through this clause that the United States Congress may preempt state law. In determining whether a state regulation is preempted by federal law, we start "with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless it [is] the clear and manifest purpose of Congress."
>
> ... [A] state enactment will be preempted where a state law conflicts with a federal law. Such a conflict may be found in two instances, when it is impossible to comply with both

> federal and state law, or where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Office of Disciplinary Counsel v. Marcone, 855 A.2d 654, 664 (Pa. 2004) (citations omitted).

Eisen asserts that application of the PCRA's timeliness requirements violates the Supremacy clause because such application would force him to choose between his state and federal rights. However, as set forth *supra,* Eisen could have "avoid[ed] this predicament . . . by filing a 'protective' petition in federal court and asking the federal court to stay and abey the federal *habeas* proceedings until state remedies are exhausted." ***Pace,*** 544 U.S. at 416. Moreover, federal law requires that a defendant exhaust his state court remedies before seeking federal *habeas corpus* relief. ***See Rhines,*** 544 U.S. at 276-77 (applying ***Lundy's*** holding that before bringing any claims to federal court, a petitioner must take each one to state court); ***Lundy,*** 455 U.S. at 518-19 (reasoning that the interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claims). Thus, we cannot conclude that application of the PCRA's timeliness requirements, in this case, violated the Supremacy Clause of the United States Constitution.

Eisen further asserts that the timeliness provisions of the PCRA do not apply because he challenges the legality of his sentence. This Court has recognized that

challenges to the legality of sentence are never waived. ***Commonwealth v. Berry,*** 877 A.2d 479, 482 (Pa. 2005). However, the PCRA states that it

> provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief. The action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect, including *habeas corpus* and *coram nobis.*

42 Pa.C.S.A. § 9542. "This language 'demonstrates quite clearly that the General Assembly intended that claims that **could** be brought under the PCRA **must** be brought under that Act." ***Commonwealth v. Voss,*** 838 A.2d 795, 799 (Pa. Super. 2003) (citation omitted) (emphasis in original). Where a defendant's claims "are cognizable under the PCRA, the common law and statutory remedies now subsumed by the PCRA are not separately available to the defendant." ***Hall,*** 771 A.2d at 1235 (citations omitted).

Issues relating to the legality of sentence are cognizable under the PCRA. ***Commonwealth v. Hockenberry,*** 689 A.2d 283, 288 (Pa. Super. 1997).

> [A] court may entertain a challenge to the legality of the sentence so long as the court

> has jurisdiction to hear the claim. In the PCRA context, jurisdiction is tied to the filing of a timely PCRA petition.

Berry, 838 A.2d at 482. Here, Eisen did not timely file his PCRA Petition, and, accordingly, the common pleas court was without jurisdiction to consider his challenge to the legality of his sentence. ***See Abu Jamal,*** 833 A.2d at 724 (stating that the PCRA's time limitation is jurisdictional in nature).

For the above-stated reasons, we vacate the Order of the common pleas court, which granted *habeas corpus* relief, and reinstate Eisen's judgment of sentence.

Order vacated; judgment of sentence reinstated; jurisdiction relinquished.

Judgment Entered:

s/ Eleanor R. Valecko
Deputy Prothonotary

DATE: OCTOBER 23, 2006

APPENDIX D — OPINION AND ORDER OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA DATED APRIL 22, 2004

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

CC No. 199302685/199304232

COMMONWEALTH OF PENNSYLVANIA

vs.

ERIC EISEN,

Defendant.

OPINION AND ORDER OF COURT

O'TOOLE, J.

On May 23, 1994, the Defendant, Eric Eisen, pled guilty to Second Degree Murder, 18 Pa.C.S.A. § 2501, Robbery, 18 Pa.C.S.A. § 3701, and Criminal Conspiracy, 18 Pa.C.S.A. § 901. At that time, the Defendant appeared before the Court represented by William Manifesto, Esquire. The Commonwealth was represented by Deputy District Attorney Christopher Conrad, Esquire. The guilty plea was pursuant to a plea agreement with the Commonwealth, whereby the Defendant would plead guilty to the charges, including Second Degree Murder, in exchange for a "Sentencing

Exhibit", which was to set forth certain facts that would be favorable to the Defendant in the event that he sought a commutation of his sentence.

Pursuant to the plea agreement, the Defendant was sentenced to life imprisonment.

No direct appeal was filed.

On December 28, 1995, the Defendant filed a Petition under the Post Conviction Relief Act alleging that this plea had been unlawfully induced. After a hearing and argument, on December 31, 1996, this Court granted the PCRA Petition, vacated the Defendant's plea and awarded him a new trial. The Commonwealth appealed and the Order of Court was reversed by the Pennsylvania Superior Court in an Order and Opinion dated May 19, 1998. A Petition for Allowance of Appeal was denied by the Pennsylvania Supreme Court on December 1, 1998 and a subsequent Petition for Reconsideration was denied on March 16, 1999.

On October 1, 1999, the Defendant filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Pennsylvania, wherein he, once again, challenged the validity of his guilty plea. The Commonwealth filed an Answer to the Petition.

While the Petition was pending in District Court, in February 2000, a local television station aired an investigative report concerning the Defendant's guilty plea. In this report, it was revealed that the victim's

mother only accepted the plea agreement reluctantly because the prosecutor informed her that neither the Defendant nor the Co-Defendant (James Smith) would ever get out of jail. In addition, it was revealed that the prosecutor did not believe that the "Sentencing Exhibit" would ever "mean anything in the world".

The Defendant sought to amend his Petition in District Court to include this after-discovered evidence. The request was never acted upon nor addressed by Magistrate Judge Kenneth Benson, who recommended in a January 2, 2001 Report and Recommendation that the Defendant's Petition be dismissed and that a certificate of appealability be denied. The Report and Recommendation were adopted by the District Court on April 5, 2002 and the Court declined to issue a certificate of appealability. The Defendant appealed the denial of the certificate of appealability to the Court of Appeals for the Third Circuit, which affirmed the denial on February 24, 2003 and denied a Petition for Rehearing on June 26, 2003. The Defendant then filed a Petition for Writ of Certiorari to the United States Supreme Court, which was denied on January 10, 2004.

On August 25, 2003, the Defendant filed a Second Petition under the Post Conviction Relief Act. The Commonwealth filed an Answer thereto and a hearing was held on January 16, 2004. At the hearing, Attorney Manifesto testified and the television investigative report was introduced into evidence. Attorney Manifesto stated that he believed that the "Sentencing Exhibit" would enhance the Defendant's chances for a

commutation and the prosecutor never told him that he believed that the document would never have any meaning. (N.T. 1/16/04, pp. 10-15)

After reviewing the extensive case file in this matter, including the Findings of Fact filed by the Defendant and the Commonwealth's Answer thereto, the Court finds as follows:

First, in deciding whether to plead guilty in this case, the Defendant, and defense counsel, considered the effect that the "Sentencing Exhibit" would have on a later request for commutation. Based on representations from the prosecutor, both of them believed that it would be beneficial and helpful in such a request. The subsequent statements by the prosecutor in the 2000 investigation indicated definitively that he did not believe that the document had any worth whatsoever, even though he led the Defendant and his then-counsel to believe otherwise. As the Defendant's guilty plea was based in large part on the plea agreement to plead guilty to Second Degree Murder in exchange for the "Sentencing Exhibit", the Court finds, again, that the Defendant's plea was unlawfully induced.

Second, having found that the Defendant's guilty plea was unlawfully induced, does the Defendant have a remedy under the Post Conviction Relief Act? The answer is in the negative. A review of the time-bar provisions of the Act convinces the Court that he does not have a remedy under the PCRA. Pursuant to § 9545 of the Act, any Petition, including a second Petition (such

as the present one), must be filed within one year of the date the judgment became final, unless the Petitioner proves that the Petition falls into one of the three enumerated exceptions. The Defendant alleges that his Petition falls under the second exception, which is the "after-discovered evidence" provision. The problem is that claiming that the case falls under one of the exceptions carries a further requirement that any Petition invoking one of the exceptions be filed within sixty (60) days of the date the claim could have been presented. The Defendant did not comply with this provision. The Defendant became aware of the statements by the prosecutor in February 2000; however, he did not file his second Petition with this Court until August 2003—more than three years later. While the Court recognizes the Defendant's argument that he was concerned that filing a second PCRA Petition in state court would jeopardize his Petition for Writ of Habeas Corpus pending in federal court, such does not change the jurisdictional provisions of the PCRA. In a very recent Superior Court decision in *Commonwealth v. Bennett*, 842 A.2d 953 (Pa. Super. 2004), that Court found that even though "there [was] no question" that the Defendant was entitled to a new trial due to an incorrect charge on accomplice liability, it could not address this "obvious error" and grant him relief under the PCRA due to "the stringent interpretation of the time-bar of the PCRA by our Supreme Court". *Id.* at 954. Such is precisely the same dilemma in which this Court finds itself—the Court believes that the Defendant is entitled to a new trial; however, the Court cannot grant this relief to the Defendant under the PCRA.

Third, having found that the Defendant's is not entitled to relief under the PCRA, does the Defendant have a substitute remedy pursuant to a state habeas corpus action? The answer is in the affirmative. The case law indicates clearly that the writ of habeas corpus remains a viable means of collateral review of a criminal conviction in the event that the PCRA fails to provide an adequate remedy. *Commonwealth v. Peterkin*, 722 A.2d 638 (Pa. 1998); *Coady v. Vaughn*, 770 A.2d 287 (Pa. 2001). In this case, the PCRA fails to provide an adequate remedy and the Defendant has been denied his constitutional right to due process. Accordingly, this Court finds that as the Defendant's guilty plea was unlawfully induced and therefore, involuntary, he is entitled to relief pursuant to the state habeas corpus statute.

ORDER OF COURT

AND NOW, to wit, this 22 day of April, 2004, it is hereby ORDERED, ADJUDGED and DECREED that the Defendant's guilty plea entered on May 23, 1994 is vacated and the Defendant is granted a new trial.

BY THE COURT:

s/ [illegible]

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JULY 12, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-1624

ERIC I. EISEN,

Petitioner,

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; RAYMOND SOBINA, Warden, State Correctional Institution at Somerset,

Respondents.

ORDER

AND NOW, this 12th day of July, 2000, the petitioner in this habeas corpus case having previously filed a motion to take discovery for the purpose of authenticating videotape document (Docket #32),

AND the court having previously indicated that it had taken that matter under advisement pending a determination whether the merits of this petition would be reached,

Appendix E

AND the court having been working on this case for the past two weeks or so, and while no Report and Recommendation will likely be filed for yet another two weeks or so, the court having determined that the *ratio decidendi* of this case will NOT be non-exhaustion or procedural default, and hence that the merits will be reached,

IT IS ORDERED that the petitioner's motion (Docket #32) to take discovery for the purpose of authenticating videotape document is GRANTED.

s/ Kenneth J. Benson
KENNETH J. BENSON
CHIEF UNITED STATES
MAGISTRATE JUDGE

APPENDIX F — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JULY 5, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 99-1624

ERIC I. EISEN,

Petitioner,

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; RAYMOND SOBINA, Warden, State Correctional Institution at Somerset,

Respondents.

MEMORANDUM AND ORDER

Now before the court in this habeas corpus case is the petitioner's Motion to Take Discovery for the Purpose of Authenticating Videotape Document (Docket #32) and its supporting memorandum (Docket #33).

Two observations are immediately made. First, as the court understands the discovery request, it seems likely to implicate what the Court of Appeals has called

the journalist's, or newsgatherer's privilege. *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980); *United States v. Cuthbertson*, 651 F.2d 189 (3d Cir. 1981). The privilege so identified is a qualified one and may be required to yield to the interests of the party seeking the discovery. And it may well be that this is such a case. But among the things that must be proved in order to pierce the privilege is that the information sought is crucial to the case of the party seeking it.

This brings us to the second observation: in this habeas case the respondent argues vigorously that the issues raised in the petition may not be entertained because of the bars of non-exhaustion/procedural default. If the respondent is right and these issues have been defaulted or are not exhausted, then we do not get to the merits of the case. If we do not get to the merits of the case, then evidence of what the prosecutor said to others about the sentencing exhibit, or what he thought of it himself, may not be relevant.

Until it is determined this evidence is relevant it certainly cannot be said to be crucial. Therefore, in consideration of the privilege I will defer ruling on this motion until such time as I conclude we must get beyond exhaustion and default.

Therefore, this 5th day of July, 2000,

Appendix F

IT IS ORDERED that petitioner's motion to take discovery (Docket #32) is TAKEN UNDER ADVISEMENT until further order of court.

s/ Kenneth J. Benson
KENNETH J. BENSON
CHIEF UNITED STATES
MAGISTRATE JUDGE